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IN THE

Supreme Court of the United States

October Term, 1966
No. 995

HARRY SCHACKMAN, NATHAN DELUCA and JOSEPH GROSS,

Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgments of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles, rendered and entered September 2, 1966, be affirmed, and/or that the appeal taken therefrom to this Court, be dismissed on the ground that the federal question is so unsubstantial as not to warrant further argument, and upon the further ground that the said judgments appealed from rest upon an adequate non-federal basis.

Statement.

This is a direct appeal from judgments entered September 2, 1966, by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Appellants were charged in verified complaints, filed in the Municipal Court of the Los Angeles Judicial District with having violated California Penal Code Section 311.2. It was alleged that on November 3, 1965, the appellants "did wilfully and unlawfully and knowingly send and cause to be sent, bring and cause to be brought, into this state for sale and distribution, and in this state prepare, publish, print, exhibit, distribute, offer to distribute, and have in his possession with intent to distribute and to exhibit and offer to distribute, obscene matter."

The consolidated cases were tried by a jury. The appellants were adjudged guilty. Appeals were taken to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles. Briefs were filed in said appellate court and oral argument presented. The matters were submitted and thereafter the judgments were affirmed (Jurisdictional Statement, Appendix "A"). Petitions for Rehearing or Certification to the Court of Appeal were denied (Jurisdictional Statement, Appendices "B", "C" and "D"). A notice of appeal to this Court was thereafter presented.

ARGUMENT.

I.

California Penal Code Sections 311 and 311.2 Are Constitutional as Enacted, and as Applied to This Case.

Section 311 of the California Penal Code:

"As used in this chapter:

(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311.2 of the California Penal Code:

> "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

On October 20, 1965, a Los Angeles Police officer purchased three films (D-15, 0-7 and 0-12) from the Shack Book Store located at 518 South Main Street in the City of Los Angeles [R. T. p. 81]. The films were then viewed by members of the Los Angeles City Attorney's office to determine whether they were actionable [R. T. p. 31]. On November 3, 1965, the officer viewed the three films in machines at the Nugget Arcade locted at 522 South Main Street in the City of Los Angeles. Appellants Schackman and Gross were arrested at the Arcade for violating California Penal Code Section 311.2 [R. T. p. 83]. On November 3, 1965, copies of D-15 and 0-7 were purchased by a police officer at the Shack Book Store [R. T. p. 95]. Appellant De Luca was arrested at the Arcade for violating California Penal Code Section 311.2 [R. T. p. 123]. Incident to the arrests, various films were taken as evidence. After the appellants made a Motion to Suppress, the trial court ordered that all films taken incident to the arrest be returned, other than D-15, 0-7 and 0-12 [R. T. p. 63].

Appellants claim that Penal Code Section 311 is vague and "standardless" and that the prosecution should have presented evidence of "contemporary stand-

ards." In *Roth v. United States* (1957), 354 U.S. 476, 489, 1 L. Ed. 2d 1498, 1509, this Court declared that to judge obscenity, "the proper test is whether to the average person applying contemporary community standards, the dominant theme of the material in question, when taken as a whole, appeals to prurient interest."

It is obvious that when the United State Supreme Court has defined the test to judge obscenity, the Court has also set the criteria which are neither vague nor "standardless." The *Roth* definition was repeated by this Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts* (1966), 383 U.S. 413, 16 L. Ed. 2d 1, 5 and in *Ginzburg v. United States* (1966), 383 U.S. 463, 16 L. Ed. 2d 31, 35.

Appellee contends that the contemporary standards test is neither vague nor standardless. Just as a jury in a negligence case is guided by the "prudent or reasonable man" test (*Satterlee v. Orange Glen School District* (1942), 29 Cal. 2d 581, 587, 177 P. 2d 279), so the jury in an obscenity case is guided by the application of contemporary standards. The definition as interpreted by the courts is neither vague nor "standardless."

The state is not debarred from regarding the trier of fact as the embodiment of community standards competent to judge a work challenged for obscenity against these standards.

> *People v. Williamson* (1962), 207 Cal. App. 2d 839, 847, 24 Cal. Rptr. 734; Cert. denied. 377 U.S. 994, 12 L. Ed. 2d 1047.

The three films were viewed by the jury [R. T. p. 131]. Testimony was neither presented nor required, as to the films' prurient appeal. In determining whether certain material is obscene, some stimuli may be so elemental that the ordinary judge or juror should be able to recognize the nature of the appeal to the average man (*United States v. 392 Copies of Magazine "Exclusive"* (1966), 253 F. Supp. 485, 493).

It should be noted that the appellants put in evidence two films which were viewed by the jury [R. T. p. 201]. These films, from a prior case involving appellant Schackman, were not used to enlighten the jury to contemporary standards, but were offered as a defense to the issue of scienter [R. T. p. 181]. The two films had been held not to be obscene by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles in the prior Schackman case (See: *Schackman v. California* (1964), 379 U.S. 3, 13 L. Ed. 2d 21).

The three films are described in detail in *Schackman v. Arnebergh* (1966), 258 F. Supp. 983, 991, where the court at page 987 held that:

> "The appeal of the films, taken as a whole, is to a shameful and morbid interest in nudity, sex, and the female organs of sex and excretion, going substantially beyond customary limits of candor in description and representation, and utterly without redeeming social importance."

The court, at page 995, concluded that as a matter of law the films are clearly, unequivocally and incontrovertibly obscene and pornographic in the hard-core sense because they come within the reasonable purview and ambit of both the Federal judicial definition of

obscenity and hard-core pornography, *Roth v. United States* (1957), 354 U.S. 476, 1 L. Ed. 2d 1498; *Mishkin v. New York* (1966), 383 U.S. 502, 16 L. Ed. 2d 56; *Ginzburg v. United States* (1966), 383 U.S. 463, 16 L. Ed. 2d 31 and the California statutory definition of obscenity and hard-core pornography (California Penal Code Section 311, *Zeitlin v. Arnebergh* (1963), 59 Cal. 2d 901, 31 Cal. Rptr. 800, 383 P. 2d 152). Appellee contends that the "art films" do not contain even a "modicum of social value" (*A Book v. Attorney General* (1966), 383 U.S. 413, 16 L. Ed. 2d 1, 6). (See: *Landau v. Fording* (1966), 245 A.C.A. 872, 882, 54 Cal. Rptr. 177; hearing denied, 65 A.C. No. 21, minutes, p. 6). The appeal to prurient interest is so basic that expert testimony of this appeal need not be presented (*United States v. 1,000 Copies of Magazines Entitled "Solis"* (1966), 254 F. Supp. 595, 597).

The appellants claim that a judicial determination as to the obscenity of the films should have been made prior to their arrests (Jurisdictional Statement, p. 6). The fact that there was no preliminary judicial determination of obscenity does not make the seizure unlawful. The appellants were entitled to move to suppress, to move to return, or to seek mandamus, and their right to due process under the First Amendment of the United States Constitution was provided by the opportunity for an early court hearing on the issue of obscenity (*People v. Campise* (1966), 242 A.C.A. Supp. 713, 717-720, 51 Cal. Rptr. 85). The appellants' motion to suppress was granted as to all films except the three before this Court.

The arrest of the appellants for violation of Penal Code Section 311.2 was not a restraint of free speech

or press. In *A Quantity of Books v. Kansas* (1964), 378 U.S. 205, 211, 12 L. Ed. 2d 809, 813, the Court held that when a defendant has the opportunity to circulate the publications, he may raise the claim of non-obscenity by defense to a prosecution. The appellants at trial claimed that the "art films" were not obscene.

Appellants' defense was "based upon a lack of knowledge by any of the defendants that the films were obscene." (Jurisdictional Statement, p. 7). "Knowingly" as used in California Penal Code Section 311(e) means that the appellants must have known the contents of the material and must have been in some manner aware of its obscene character. "Knowledge that the matter is obscene" as used in the statute does not mean "knowledge that a court would decide the matter to be obscene." (*People v. Campise* (1966), 242 A.C.A. Supp. 713, 723, 51 Cal. Rptr. 815). *Mishkin v. New York* (1966), 383 U.S. 502, 16 L. Ed. 2d 56, 63, held that the element of scienter is met where only those who are in some manner aware of the character of the material are punished. Appellee contends that the appellants were aware of the character and contents of the films.

A retail license from the Los Angeles City Clerk was issued in the name of Nathan De Luca and the Shack Book Store at 518 South Main Street [R. T. p. 120]. De Luca testified that he had viewed the film D-15 [R. T. p. 184]. De Luca was the owner of the Bookstore and "had been selling films for quite a while." [R. T. p. 125].

A business license tax registration certificate was issued in the name of Joseph E. Gross for the Nugget Arcade at 522 South Main Street [R. T. p. 120]. Gross was the manager of the Arcade [R. T. p. 136]. He supervised the "art films" that go into the machines. He purchased them and edited them [R. T. p. 166]. Gross testified that if the material was not a "stage film," then it was not obscene [R. T. p. 153]. Gross had seen the film D-15 being shown [R. T. p. 194]. Gross had never actually seen anything too "raw" in a film [R. T. p. 168].

A police commission permit was issued to Harry Schackman doing business as The Nugget Arcade [R. T. p. 120]. Schackman is the owner [R. T. p. 8] and would come into the arcade at least three to four times a week [R. T. p. 148] and would stay from noon to six o'clock [R. T. p. 149]. If a machine was left on, Schackman would look at it for a few seconds [R. T. p. 149]. He was observed in the arcade going in and out of the backroom [R. T. p. 122].

The central issue in a criminal obscenity trial pivots on the potentially punishable conduct of the defendant rather than on the allegedly obscene nature of the material (*In re Klor* (1966), 64 Cal. 2d 816, 821, 51 Cal. Rptr. 903, 415 P. 2d 791). The "No Minors Allowed" sign [R. T. p. 152], the "girlie" photos on the wall [R. T. p. 92] and the catalogue of "girlie nude" films that could be purchased [R. T. p. 96] were further evidence of the appellants knowingly exploiting, pander-

ing and titillating the public with these films. The evidence amply shows that the appellants knowingly engaged in the calculated purveyance of filth. (*Smith v. California* (1959), 361 U.S. 147, 4 L. Ed. 2d 205).

It is submitted that California Penal Code Sections 311 and 311.2 were constitutionally applied in this case. Obscenity is not given the free speech and free press protection of the First Amendment of the United States Constitution. (*Kirby v. Municipal Court* (1965), 237 Cal. App. 2d 335, 338, 46 Cal. Rptr. 844). The appellants were not denied due process and equal protection of the law when they were arrested, prosecuted and convicted for knowingly purveying hard-core pornography.

II.

The Supreme Court of the United States Should Not Take Jurisdiction to Review an Order Where No Opinion Was Delivered by the Highest State Court.

The record and the jurisdictional statement disclose that no opinions were delivered by the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles when the judgments were affirmed.

In *Stembridge v. State of Georgia* (1952), 343 U.S. 541, 96 L. Ed. 1130, it was held that, where the highest court of the state delivers no opinion and it appears the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment.

Conclusion.

The appeal does not disclose that there has been a violation of appellants' rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not theretofore determined by this court.

Appellee urges, therefore, that the appellants present no substantial question for the decision of this Court; that the judgments sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

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